Filed 5/18/10 P. v. Bernal CA4/3

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Appellant, v. JOSE LUIS BERNAL, Defendant and Respondent.	G042581 (Super. Ct. No. 08WF0836) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Robert R. Fitzgerald, Judge. (Retired judge of the Orange Super. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Reversed and remanded with directions.

Tony Raukauckas, District Attorney and Daphne Sykes Scott, Deputy District Attorney for Plaintiff and Appellant.

James R. Bostwick, Jr., under appointment by the Court of Appeal, for Defendant and Respondent.

* * *

Defendant Jose Bernal pled guilty to one count each of robbery and attempted robbery (Pen. Code,[1] §§ 211, 664, subd. (a)), and admitted he personally used a firearm in committing the offenses (§ 12022.53, subd. (b)). The court attempted to convince the prosecutor to dismiss the section 12022.53 enhancement with its mandatory 10-year enhancement so the court could sentence defendant to five years in state prison. The prosecutor refused. Subsequent to defense counsel briefly arguing the mandatory enhancement constitutes cruel and unusual punishment, the court imposed the maximum possible state prison commitment, stayed execution of the sentence, and placed defendant on probation. The prosecution appeals, contending the court lacked the jurisdiction to grant defendant probation and that imposition of the 10-year enhancement mandated by section 12022.53, subdivision (b) does not constitute cruel or unusual punishment as contended under the facts of this case. We agree and reverse.

I

FACTS

Defendant entered guilty pleas to one count of robbery (§ 211), one count of attempted robbery (§§ 211, 664, subd. (a)), and admitted he personally used a firearm (§ 12022.53, subd. (b)) in committing each of the offenses. According to evidence at the preliminary examination, defendant and his codefendant, Amilcar Vasquez,[2] entered a food store in Garden Grove on May 3, 2008, at about 7:30 p.m. A customer in the store, a man identified as Acosta, saw defendant and Vasquez sitting on the hood of a red car before he entered the store.

Vasquez went to the coolers in the back of the store. Defendant pointed a shotgun at Acosta and, in Spanish, demanded Acosta's wallet. Acosta feared for his life.

[1] All statutory references are to the Penal Code.

[2] Vasquez is not a party to this appeal.

While Acosta was still attempting to remove his wallet, defendant turned the shotgun on the owner of the store, Morsed Alam. Acosta took that opportunity to run out of the store and across the street.

Vasquez took beer from the store and defendant took money from Alam. When they ran from the store, Vasquez immediately went back to the red car. Defendant ran a short distance toward Acosta, turned around, and ran back to the car. Defendant and Vasquez then drove away in the red car. The police stopped them about a mile and a half later. Inside the car was an unloaded but operable shotgun.

Prior to accepting defendant's guilty plea, the court unsuccessfully attempted to persuade the prosecutor to agree to dismissal of the section 12022.53 mandatory 10-year enhancement. The court stated if the enhancement was not dismissed and the court sentenced defendant to prison, the court "would have its hands tied and would be stuck with an absolute minimum [commitment] of 12 years in state prison" even though the case was, in the court's opinion, worth five years in prison.

The prosecutor argued section 12022.53, subdivision (g) precludes the court from granting defendant probation. Defense counsel contended the present case was "sufficiently analogous" to *People v. Dillon* (1983) 34 Cal.3d 441 to justify the court granting probation. The court, concluded "there's no way out for me then," and sentenced defendant to 19 years in state prison. The court stayed execution of the sentence, and ordered defendant to serve one year in the county jail as a condition of probation.[3]

The People filed a timely notice of appeal.

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[3] The fact that the court chose to impose *the maximum possible sentence* before suspending execution of the sentence and granting probation, would appear to indicate the court's action was motivated more by a desire to settle the case and move it from the court's calendar than a concern that imposition of the 10-year enhancement would constitute cruel or unusual punishment.

II

DISCUSSION

When a defendant personally uses a firearm in the commission of a robbery (§ 12022.53, subd. (a)(4)) or attempted robbery (§ 12022.53, subd. (a)(18), section 12022.53 mandates the defendant's sentence be enhanced "by an additional and consecutive term of imprisonment in the state prison for 10 years." (§ 12022.53, subd. (b).) The Legislature has prohibited courts from striking the enhancement under section 1385. (§ 12022.53, subd. (h.) Moreover, when the enhancement has been admitted or found to be true, the court may not grant probation, nor suspend execution of the sentence. (§ 12022.53, subd. (g).)

As pled, defendant's maximum exposure on this case was 19 years in state prison. His minimum possible sentence was 12 years in state prison, consisting of a two-year low term on the robbery and a consecutive 10-year term for personally using a firearm. Defendant contends the trial court properly stayed execution of the 19-year state prison sentence to avoid imposing a punishment that would have violated California's provision against cruel or unusual punishment (Cal. Const., art. I, § 17).[4]

"'[S]ubject to the constitutional prohibition against cruel and unusual punishment, the power to define crimes and fix penalties is vested exclusively in the legislative branch.' [Citations.]" (*People v. Superior Court* (*Romero*) (1996) 13 Cal.4th 497, 516.) """[T]he final judgment as to whether the punishment [the Legislature] decrees exceeds constitutional limits is a judicial function."""" (*People v. Dillon* (1983) 34 Cal.3d 441, 478.) "Reducing a sentence under *Dillon* 'is a solemn power to be exercised sparingly only when, as a matter of law, the Constitution forbids what the

[4] Defendant does not raise an Eight Amendment challenge.

sentencing law compels.' [Citation.]" (*People v. Felix* (2003) 108 Cal.App.4th 994, 1000 (*Felix*).)

In determining whether the sentence required by a statute constitutes cruel or unusual punishment, we look to three factors. First, we examine "the nature of the offense and/or the offender, with particular regard to the degree of danger both present to society." (*In re Lynch* (1972) 8 Cal.3d 410, 425.) Second, we "compare the challenged penalty with the punishments prescribed in the same jurisdiction for different offenses which, by the same test, must be deemed more serious." (*Id*. at p. 426, italics omitted.) Third, we compare "the challenged penalty with the punishments prescribed for the same offense in other jurisdictions having an identical or similar constitutional provision. (*Id*. at p. 427, italics omitted.) As defendant points to no other offenses in this or any sister state, defendant must be deemed to contend the mandatory imposition of section 12022.53's 10-year enhancement violates the Constitution based solely upon the nature of the offense and/or the offender.

In considering these factors, "'[t]he nature of the offense is viewed both in the abstract and in the totality of circumstances surrounding its actual commission; the nature of the offender focuses on the particular person before the court, the inquiry being whether the punishment is grossly disproportionate to the defendant's individual culpability, as shown by such factors as age, prior criminality, personal characteristics, and state of mind. [Citations.]' [Citation.]" (*People v. Zepeda* (2001) 87 Cal.App.4th 1183, 1214.) In the abstract, robbery is a crime of violence, involving as it does the use of force or fear to steal from the victim. The use of a firearm in the commission of a robbery increases the seriousness of the offense, a fact repeatedly recognized by the Legislature. (See *People v. Reaves* (1974) 42 Cal.App.3d 852, 856 [Legislature enacted §§ 12022 and 12022.5 firearm enhancements "to deter persons from creating a potential

for death or injury resulting from the very presence of a firearm at the scene of a crime"].) The danger presented by introducing a firearm into the crime exists whether the firearm is loaded or unloaded. (See *People v. Masbruch* (1996) 13 Cal.4th 1001, 1006-1007 and cases cited therein [§§ 12022, subd. (a)(2), 12022.3, subd. (a) firearm enhancements applicable though firearm unloaded]; *People v. Sheldon* (1989) 48 Cal.3d 935, 962 [§ 12022.5 applicable though firearm unloaded or inoperable]; § 12021.5, subd. (a) ["person who carries a loaded or unloaded firearm . . . during the commission or attempted commission of any street gang crimes"].) Because the mere use of a firearm in the commission of one of the listed crimes increases the risk for death or injury, subdivision (b) of section 12022.53 provides in part "[t]he firearm need not be operable or loaded for this enhancement to apply." (§ 12022.53, subd. (b).) "This statutory provision punishes the perpetrator of one of the specified crimes more severely for introducing a firearm into a situation which, by the nature of the crime, is already dangerous and increases the chances of violence and bodily injury." (*Felix*, *supra*, 108 Cal.App.4th at p. 1001.)

Defendant contends the facts of his case are "much less egregious" than those in *Felix*, *supra*, 108 Cal.App.4th 994, a case in which Division One of this court rejected a similar cruel or unusual challenge to the mandatory 10-year enhancement of section 12022.53. In *Felix*, the victim was seated in her car when Felix approached her and asked for a cigarette. As she reached for one, Felix stuck a gun in her ribs and told her to get out of the car. When the victim replied with an obscenity, Felix pushed the gun hard against her ribs and told her to move over. She did. Felix got into the car and drove out of the parking lot. (*Id*. at p. 997.) After driving about a mile, Felix stopped the car and told the victim to get out. She complied and Felix drove away. (*Id*. at pp. 997-998.)

According to defendant, whereas the victim in *Felix* was actually injured during the carjacking — she sustained a bruise caused by the gun being pressed against her side (*Felix*, *supra*, 108 Cal.App.4th at p. 998) — neither of the victims in this case were injured. After the carjacking, Felix changed the license plate on the car to avoid capture and when he was finally arrested and brought to trial, Felix testified he did not commit carjacking. (*Ibid*.) Here, as defendant points out, he used an unloaded firearm and neither victim was harmed or even touched. In addition, defendant has admitted his actions. These are factors to be considered, but they are not determinative.

In the present case, the robbery does not appear to have been a crime of opportunity or one committed on the spur of the moment. It was planned. Defendant and Vasquez evidently drove to the food store with the shotgun in the car. They appear to have staked out the store as they sat on the hood of their parked car, watching and waiting. When they entered the store, Vasquez immediately went to the back of the store to grab the beer while defendant pointed the shotgun at Acosta and demanded his wallet. Then defendant turned his attention to the owner of the store and robbed him. When Vasquez and defendant left the store, Vasquez went immediately back to the car and defendant started in the direction of the fleeing Acosta, before apparently thinking better of it and heading back to the car.

Although the firearm was unloaded and the use was therefore less violent than a number of cases involving use of a firearm, defendant's use was more than that necessary to invoke the enhancement. "The enhancement is not limited 'to situations where the gun is pointed at the victim . . . .' [Citation.] Personal use of a firearm may be found where the defendant intentionally displayed a firearm in a menacing manner in order to facilitate the commission of an underlying crime. [Citations.]" (*People v. Carrasco* (2006) 137 Cal.App.4th 1050, 1059.) Defendant did not merely display the

weapon, he pointed it at each of his victims. It had the intended result. Acosta feared for his life and the owner of the store forfeited money to defendant. We note in *Felix*, the defendant contended one of the factors favoring a cruel or unusual finding was that the victim in his case was not afraid, as evidenced by her swearing at him even though he had the gun at her side. (*Felix*, *supra*, 108 Cal.App.4th at pp. 1000-1001.)

Felix was 21 years old at the time of his crime. (*Felix*, *supra*, 108 Cal.App.4th at p. 999.) At sentencing, his attorney "presented a psychological evaluation that, among other things, described Felix as an 'individual of Low Average intellectual ability' whose 'cognitive effectiveness is limited by the lack of flexibility in his adaptional approach.' The evaluator opined that Felix 'does not present . . . a high likelihood [of engaging] in aggressive-destructive behavior.'" (*Id*. at p. 998.) Defendant, a year older than Felix, is relatively young at 22 years of age. Unlike the court in *Felix*, we do not have any evaluation of defendant. The information did not allege defendant has suffered any "strike" prior convictions (§ 667, subd. (d)) or served any state prison terms (§ 667.6, subd. (b)). However, the record does not indicate defendant's background in any respect. Contrary to defendant's assertion, the fact that the "trial court may have been aware of other information regarding the offenses and defendant's personal characteristics that has not been included in the record" is not something we may consider. "Deciding that a punishment is cruel or unusual under *Dillon* presents a question of law subject to independent review; it is 'not a discretionary decision to which the appellate court must defer.' [Citation.]" (*People v. Felix*, *supra*, 108 Cal.App.4th at p. 1000.) We cannot assume the existence of facts not present in the record.

The minimal distinctions between the facts in *Felix* and defendant's crimes and the complete lack of any facts relating to his personal characteristics, background, or state of mind do not convince us defendant has carried his "considerable burden" (*People*

v. Wingo (1975) 14 Cal.3d 169, 174) in challenging the 10-year enhancement of section 12022.53, subdivision (b) as cruel or unusual. After examining the offenses in the abstract, the circumstances surrounding the commission of the offenses in this case, and defendant's personal circumstances (or lack thereof), we find application of the 10-year enhancement is not "grossly disproportionate to the defendant's individual culpability as shown by such factors as his age, prior criminality, personal characteristics, and state of mind." (*People v. Dillon*, *supra*, 34 Cal.3d at p. 479.)

Absent a finding imposition of the enhancement violates the Constitution, the court lacked the authority to avoid the mandatory 10-year enhancement by suspending execution of the sentence and placing defendant on probation. (§ 12022.53, subds. (g) [court shall not grant probation nor suspend execution of sentence], (h) [court shall not strike allegation].) Accordingly, we find the sentence must be reversed.

This brings us to what should be done upon remand. As noted above, defendant's minimum sentence in this matter, should he be convicted of the robbery and the section 12022.53, subdivision (b) enhancement be found true or admitted, is 12 years in state prison. As part of the change of plea procedure, defendant signed a multi-paged change of plea form. Page two of that form demonstrates he pled guilty based upon the promise that the court would grant him probation. The form is preprinted and contains a number of advisements to cover an array of possible circumstances. One of the advisements is that the defendant is ineligible for probation. That advisement was crossed off. The fact that defendant was not advised he is not eligible for probation and was specifically promised probation in exchange for his guilty pleas requires that he be permitted to withdraw his plea upon remand. (See *People v. Renfro* (2004) 125 Cal.App.4th 223, 233 [typical remedy for violation of plea agreement is to allow defendant to withdraw the guilty plea].)

III

DISPOSITION

The sentence is reversed and the case is remanded. Upon remand, the trial court shall permit defendant, should he desire to do so, to withdraw his guilty plea and admission.

MOORE, ACTING P. J.

WE CONCUR:

FYBEL, J.

IKOLA, J.